IN THE

Supreme Court of the United States

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OCTOBER TERM, 1961

No. 691

DOMINIC ALAIMO,
Petitioner

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

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UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

DOMINIC ALAIMO, your petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on December 28, 1961.

Opinions Below

Two opinions were rendered by the District Court in this case, one unreported (which appears at page 10(a) of the appellant's appendix in the proceedings in the court below) and the other reported (which appears at page 1(b) of the appellee's appendix in the court below) and is cited as 191 F. Supp. 625. The opinion of the Court of Appeals has not been reported. A copy is appended in Appendix A, page 9.

Jurisdiction

The judgment of the Court of Appeals was entered December 28, 1961. The jurisdiction of this Court is invoked under the provisions of 28 USCA §1254(1).

Questions Presented

1. Whether, when an individual has received bimonthly payments from an employer totaling in number 34, and is subsequently indicted for a violation of a labor statute restricting payments to employee representatives (29 USCA §186(b)(d)), the government may choose as the allowable unit of prosecution 34 separate and distinct offenses, rather than one single offense, under a statute which does not explicitly give the answer.

2. Whether a defendant in a criminal trial who has not taken the stand in his own behalf has been deprived of his constitutional rights against self-incrimination through the prosecution's introduction into evidence of his grand jury testimony, some of which was elicited from the defendant by the examining U. S. Attorney under the guise that the questions asked could not possibly incriminate him of a federal offense.

Statutory Provisions Involved

Taft-Hartley Act of June 23, 1947, c. 120, Title III §302, 61 Stat. 157, 29 U.S.C.A. §186:

"Section 302. Restrictions on payments to employee representatives; exceptions; penalties; jurisdiction; effective date; exception of certain trust funds

"(a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

"(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

"(c) The provisions of this section shall not be applicable (1) with respect to any money or other thing of value payable by an employer to any representative who is an employee or former employee of such employer, as compensation for, or by reason of, his services as an employee of such employer; . . .

"(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both."

Statement of the Case

This is a petition for certiorari from a judgment and sentence rendered by the United States District Court for the Middle District of Pennsylvania and affirmed by the United States Court of Appeals for the Third Circuit, arising from a conviction in violation of 29 USCA §186(b)(d), said statute being commonly known as the Taft Hartley Act.

The petitioner, Dominic Alaimo, is a resident of Luzerne County, within the Jurisdiction of the United States District Court for the Middle District of Pennsylvania. For many years the petitioner was employed in various capacities by producers of anthracite coal, most

recently by the Knox Coal Company, a corporation leasing coal lands from the Pennsylvania Coal Company.

On March 18, 1959, Indictment No. 13225 was returned by a Grand Jury, charging inter alia that:

> ". . . Dominic Alaimo did unlawfully, wilfully and knowingly receive and accept and agree to receive and accept from Knox the sum of $354.70. . . .",

The remaining 33 counts in the indictment re-aver the same charge, the only difference being as to times and amounts.

Very basically Indictment No. 13225 commences with the Knox Coal Company pay period for the first half of August 1957 and continues according to Knox bi-monthly pay periods through the remaining 33 counts.

The defendant was arrested on May 19th, 1959, and on March 24, 1959, entered a plea of not guilty. Prior to trial a motion was presented by the petitioner requesting that the Indictment be quashed or, in the alternative, that the Government be forced to elect the count upon which they would proceed. This motion was denied.

On May 19th, 1959, the jury returned a verdict finding the defendant guilty on all 34 counts of the Indictment. Motions for a new trial, judgment of acquittal and in arrest of judgment were denied on February 9, 1961, in an opinion and order handed down by the trial judge.

On March 10, 1961, defendant was sentenced to pay a fine of $7,651.88 on Count 1, to imprisonment for a period of one year on Count 2, one year on Count 3, said sentences to run consecutively and not concurrently and a period of probation for two years was imposed on Counts 4 to 34 with a condition of the probation being that the defendant pay the fine imposed in Count 1, in full.

On the same day a Notice of Appeal from the judgment and sentence was filed and on December 4th, 1961, argument was held before the United States Court of Ap-

peals for the Third Circuit. On December 28, 1961, the judgment of the lower court was affirmed.

Reasons for Granting the Writ

I. By holding that "the Government's case was sound and that each unlawful payment to the defendant constitute a separate offense" (C.A.Op. Infra page 12) the United States Court of Appeals for the Third Circuit has refused to follow decisions of the Supreme Court of the United States holding that in cases where Congress has not declared what the allowable unit of prosecution shall be, penal statutes shall be construed in favor of the less harsh result, and in effect has made "each stick in a faggot a single criminal unit." This ruling completely ignores the most recent decisions of this Honorable Court dealing with the subject.

Recent decisions of this Court have emphatically enunciated a principle of statutory construction dealing with any ambiguity concerning the "unit of prosecution" which might be raised by the manner in which Congress chose to draft a penal provision. *Bell vs U.S.* (1955), 349 U.S. 81, 99 L.Ed. 905; 75 S.Ct. 620.

In this connection it must be noted that the Third Circuit Court of Appeals in affirming the decision of the lower court stated, "That the question whether the legislation looks towards penalizing a course of conduct or individual offenses, is not always sun-clear." (C.A.Op. Infra page 11)

We respectfully submit that this quotation is a massive piece of understatement but more importantly it is this conclusion which destroys the foundation on which the Third Circuit's decision is based.

In accord with your petitioner's position see: *U.S. vs Universal C.I.T.Corp.*, 1952, 344 U.S. 218, 97 L.Ed. 260, 73 S.Ct. 227; *Re Nielsen*, 1889, 131 U.S. 176, 33 L.Ed. 118, 9 S.Ct. 672, and *Re Snow*, 1887, 120 U.S. 274, 30 L.Ed.

658, 7 S.Ct. 556; *U.S. vs Personal Finance Co.*, D.C.S.D. N.Y. 1959, 174 F.Supp. 871; *U.S. vs Woody Fashions, Inc.*, D.C.S.D. N.Y. 1961, 190 F.Supp. 709. See also *Scott vs U.S.*, 4th Cir. 1958, 255 F. 2nd 18 at page 20; *Smith vs U.S.*, 6th Cir. 1954, 211 F.2nd 957.

Argument may be advanced against your petitioner by citing *Patton vs U.S.*, 8th Cir. 1930, 42 F. 2nd 68; *Ebling vs Morgan*, 1915, 237 U.S. 625, 35 S.Ct. 710, 59 L.Ed. 1154.

The statute involved here designates the offense a misdemeanor, 18 USCA 1 (2), a violation of which has been labelled a crime malum prohibitum and not malum in se, in which the Government need not even prove conscious wrongdoing as a part of its case. *U.S. vs Ryan*, 2nd Cir. 1956, 232 F. 2nd 482, at page 483.

As this Court has said, "about only one aspect of the problem can one be dogmatic. When Congress has the will it has no difficulty in expressing it—when it has the will, that is, of defining what it desires to make the unit of prosecution and, more particularly, to make each stick in a faggot a single criminal unit. When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will the ambiguity should be resolved in favor of lenity."

In view of the fact that there is no Supreme Court case dealing with the allowable unit of prosecution under this statute and since there is ambiguity in this area, it is therefore respectfully submitted that the decision of the United States Court of Appeals for the Third Circuit in ruling against your petitioner failed to follow the clearly enunciated principles which this Court has prescribed for the construction of a penal statute.

II. There is no doubt that your petitioner was treated in a most severe fashion when he appeared as a witness before a grand jury. Without quibbling about whether this was, as the Circuit Court said, an unhappy time, or, as your petitioner maintains, a situation which exceeded the bounds of propriety insofar as the examination by the United

States Attorney is concerned, it must be emphasized that, as the District Court said no hard and fast Federal Rule has developed in this area. The Circuit Court of Appeals in its decision (infra Appendix A, page 14) did not cite any cases in support of its position in dealing with this question on appeal. This for the reason that one is rarely confronted with tangible evidence of patently improper activity before a grand jury. We most respectfully submit that this Court should delineate the bounds of propriety within which a U. S. Attorney may conduct his interrogation and speak out vigorously against the use of any trickery, coercion or other improper practice.

Your petitioner chose not to take the stand in his own defense at the trial of this matter in the District Court. Over defense objections the government was permitted to introduce into evidence by way of rebuttal certain testimony of your petitioner taken before a Grand Jury. The entire record of the proceedings before the grand jury appears on page 14 (a) of the appellant's appendix before the U.S. Court of Appeals for the Third Circuit.

It was and remains the contention of your petitioner that some, if not all, of the statements made by your petitioner and received in evidence by the District Court were illegally obtained. Nowhere has this Court handed down any decision with respect to the admissibility of grand jury testimony which is elicited from a witness through improper conduct on the part of the U.S. Attorney. Neither has this Court spoken on the question of the effect, if any, that such improper conduct should have upon the entire grand jury proceeding. If his conduct in dealing with a witness is outside the bounds of propriety does it have the effect of rendering all the testimony received null and void?

If, as occurred in this case, the U. S. Attorney gathers information by advising the then witness that his answer could not possibly incriminate him of a federal crime are any and all answers thereafter made inadmissible as against the defendant?

Does an interrogating U. S. Attorney have carte blanche in his methods of interrogating and examining a witness?

What limits for the protection of a witness should be applied to the type of inquiry which a U. S. Attorney may conduct before a grand jury?

We respectfully submit to this Court that the matter is of sufficient consequence not only with respect to your petitioner but with respect to every prospective witness who may in the future be called to appear before a grand jury to warrant a full hearing on the merits of this subject. Cf. *U.S. vs Cleary*, D.C.S.D. N.Y. 1958, 164 F.Supp. 328; reversed, 2nd Cir. 265 F. 2nd 459.

Conclusion

The rulings below add nothing but inconsistency to the problem of the allowable unit of prosecution. Further, those rulings are in conflict with the clearly enunciated rules of this Court regarding the construction of a penal statute. Further, the rulings of the lower courts dealing with the treatment of your petitioner as a witness before the grand jury are in conflict with the decisions of this Court and the Constitution of the United States regarding the privilege against self-incrimination.

Respectfully submitted

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Appendix A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,614

UNITED STATES OF AMERICA

v.

DOMINIC ALAIMO,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Argued December 4, 1961

Before GOODRICH, STALEY and GANEY, *Circuit Judges.*

OPINION OF THE COURT

(Filed December 28, 1961)

By GOODRICH, *Circuit Judge.*

The appellant was convicted[1] for violation of 29 U. S. C. A. §186(b), (d), commonly known as the Taft-Hartley Act. Subsection (b) of the statute provides:

"(b) It shall be unlawful for any representative of any employees who are employed in an industry

[1] United States v. Alaimo, 191 F. Supp. 625 (M.D. Pa. 1961).

affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value."

Subsection (d) labels the forbidden conduct a misdemeanor and provides for a fine of not more than $10,000 or imprisonment for not more than one year, or both.

The Government charged thirty-four violations of the act in the twice-a-month receipt by the defendant of checks from the Knox Coal Company over a period beginning August 15, 1957, and ending December 31, 1958. The prosecution's theory was that these checks, while ostensibly made to an employee on the payroll of the company, were in fact paid to him as a representative of the company's employees and not, as appellant claims, as compensation for services. Payments of the latter type are exempted from the prohibition of the statute by Subsection (c).[1]

In urging reversal the first point the appellant makes is that the Government should have been compelled to elect which one of the thirty-four counts it chose to stand upon. The appellant's theory is that there were not thirty-four offenses committed here but only one. For this proposition he relies heavily upon the Supreme Court's decision in *United States v. Universal C.I.T. Credit Corp.*, 344 U. S. 218 (1952). There the Court, through Mr. Justice Frankfurter, discussed the question whether a statutory provision defining an offense is directed toward a course of conduct or toward each performance of the forbidden act. The Court came to the conclusion that the Fair Labor Standards Act proscribes a course of conduct and not a series of individual offenses. The appellant also relies upon *Bell v. United States*, 349 U. S. 81 (1955), in which the prosecu-

[1] "(c) The provisions of this section shall not be applicable (1) with respect to any money or other thing of value payable by an employer to any representative who is an employee or former employee of such employer, as compensation for, or by reason of, his services as an employee of such employer. . . ."

tion charged two violations of the Mann Act where the defendant in one trip took two women across a state line for immoral purposes. But, as the Court pointed out in that case, this was an improper endeavor to turn a single transaction into multiple offenses. In contrast to *Universal C.I.T.* and *Bell*, one may point to convictions for offenses against the narcotics statutes and against statutes dealing with the illicit manufacture, transportation and sale of untaxed alcoholic beverages, where a single act may constitute an offense against several prohibitions of the statute and be penalized accordingly.[1] It is, of course, true, as the Court points out in the *Universal C.I.T.* case, that the question whether the legislation looks toward penalizing a course of conduct or individual offenses is not always sun-clear. However, we see no reason for concluding that in this case a course of conduct is struck at. Here were individual receipts of money from the company over many months, and each time the defendant received a check from the company he was doing that which the statute forbade. We think the analogy to *Patton v. United States*, 72 F. 2d 68 (8th Cir.), *conforming to the Supreme Court's answer to certified questions*, 281 U. S. 276 (1930), is clear. There, the defendant was charged with several payments to a prohibition agent for "protection" in violation of the statute. The Court had no difficulty in adopting the Government's theory that the acts of the defendant in making payments every two weeks were separate violations. That case is directly in point, as are decisions having to do with the effect of bribery in more than one instance by the same defendant. See *Biddle v.*

[1] As to the narcotics statutes, see, *e.g.*, Harris v. United States, 359 U. S. 19 (1959); Gore v. United States, 357 U. S. 386 (1958); Blockburger v. United States, 284 U. S. 299 (1932); Yates v. United States, 252 F. 2d 551 (6th Cir. 1958), *aff'd but an equally divided Court*, 362 U. S. 389 (1960). As to the liquor laws, see, *e.g.*, Albrecht v. United States, 273 U. S. 1 (1927); Johnson v. United States, 276 F. 2d 84 (4th Cir. 1960).

Wilmot, 14 F. 2d 505 (8th Cir. 1926); *cf. Lankford v. United States*, 200 F. 2d 237 (10th Cir. 1952).[1]

We conclude without hesitation here that the Government's case was sound and that each unlawful payment to the defendant constituted a separate offense. We think it quite reasonable that Congress should have provided for a separate punishment each time an employee representative places a price upon two weeks of labor peace; just as it did for each transaction in which prohibition agents were paid for two weeks' protection. *Cf. Patton v. United States*, *supra*. The fact that the prohibited act constitutes a misdemeanor instead of a felony we think has no bearing on the conclusion.

The appellant next charges that the court committed error in instructing the jury regarding the burden of proof. We think this point is not well taken. The jury was fully informed that the burden of the entire case rested upon the prosecution. The defense was that the defendant was paid

[1] Other illustrative situations in which separate similar acts have been held to be punishable as individual offenses include Badders v. United States, 240 U. S. 391 (1916) (separate postings of letters pursuant to one fraudulent scheme are separate offenses); United States v. Guterma, 281 F. 2d 742 (2d Cir.), *cert. denied*, 364 U. S. 871 (1960) (each violation of Securities Exchange Act of 1934, §13, as amended, 15 U. S. C. A. §78m, 78ff, punishable as separate offense); United States ex rel. Simkoff v. Mulligan, 67 F. 2d 321 (2d Cir. 1933) (sale and possession of counterfeit bill punishable separately); Rossi v. Aderhold, 67 F. 2d 315 (5th Cir. 1933) (separate sales of narcotics by defendant to same buyer constitute separate offenses); People v. Stanford, 16 Cal. 2d 247, 105 P. 2d 909 (1940) (each misappropriation pursuant to scheme of embezzlement constitutes separate offense).

The exact wording of the instruction was: "You begin your consideration of this case with the presumption that the defendant, although accused, is innocent. The burden of overcoming this presumption of innocence rests upon the government, and that burden never shifts throughout the entire trial. This presumption remains in favor of the defendant throughout the trial until, if at all, during the course of your deliberation, it is overcome by credible evidence sufficiently clear and strong to convince you beyond a reasonable doubt of the guilt of the defendant of the offenses charged."

by the company for performing services as a watchman. That, of course, was a question of fact. The court stated the defense to the jury and left to it the question of deciding whether he was a watchman or whether he was not. Some questions were asked to the jury to the effect that if he was a watchman, what was he watching? These were put to get the jury to understand what the problem was. We do not find in them anything which modifies the court's instruction that the burden of the whole case was on the Government.

The defendant's next point is that the court materially changed the indictment when he instructed the jury. Of course, that cannot be done. *Stirone v. United States*, 361 U. S. 212 (1960). But this point is not well taken. What the defendant complained of was an explanation by the judge of the purpose of the statute. The explanation may or may not have been necessary. In any event, it constituted no change from what was charged in the indictment.

In his last two points, the appellant makes a double-barreled attack upon the conduct of the case by the trial judge. The Government, in its rebuttal testimony, introduced a statement by the defendant taken from the transcript of a grand jury proceeding in another case in the Southern District of New York. The effect of this admission was to disprove the truth of the defense that, during the period involved, the defendant was employed by Knox Coal Company.

Appellant's theory is that if the Government had this proof, which tended to show the falsity of the defense of employment, it should have brought this evidence into its case in chief and not held back the most devastating piece for rebuttal. It may be conceded that, even before defendant introduced any evidence, the probability was that the defense would be in the nature that the payments were bona fide compensation for employment. The prosecution could not know that to a certainty, however, in advance of the trial.

Regardless of this point, it is very clear that in gen-

eral the order in which proof may be offered and received is a matter for the discretion of the trial judge. *E.g., United States v. Montgomery*, 126 F. 2d 151 (3rd Cir.), *cert. denied*, 316 U. S. 681 (1942); *United States v. Hirsch*, 74 F. 2d 215 (2d Cir. 1934), *cert. denied*, 295 U. S. 739 (1935). We do not see that that discretion was abused, and we think what the judge did here is supported by authority. See *People v. Accey*, 35 Cal. 2d 487, 218 P. 2d 527 (1950); 6 WIGMORE, EVIDENCE §§1869, 1873 (3d ed. 1940); *cf. United States v. Lieblich*, 240 F. 2d 890, 895 (2d Cir.), *cert. denied*, 355 U. S. 896 (1957); *Samish v. United States*, 223 F. 2d 358, 365 (9th Cir.), *cert. denied*, 350 U. S. 848 (1955).

The final attack upon this grand jury testimony by the appellant is that he was deprived of his constitutional rights in its reception. In this New York grand jury proceeding the appellant was a witness. He was not then charged with crime nor was there any indication, at that time, of an intention to charge him with a crime. He was advised of his rights before he started to testify. As the testimony proceeded he and the United States Attorney had a rather unhappy time. The witness was asked questions and he refused to answer a number of them, claiming the Fifth Amendment privilege. He was scolded by the United States Attorney for refusing to answer questions which the Attorney said were obviously not incriminating. All this not unusual difference of opinion does not bear upon the immediate question before us here. Prior to the time when the witness started to refuse to answer questions, he had already stated what his then occupation was, whether he had any other occupation than the dress business which he described, and, if so, when had it ceased. He answered, "Two years [ago]." This was the admission which became relevant in the trial of this case. It came after the defendant had been advised of his constitutional rights and before there was any objection by him to any question asked. The fact that a later discussion between him and the United States Attorney may have involved the same or similar

questions does not change the fact that the admission used in the Government's case here was made without any objection whatever.

The contentions of the defendant have been carefully examined. We find no basis for reversal. The judgment of the district court will be affirmed.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 9–15) is not yet reported. The opinion of the district court denying motions in arrest of judgment, for judgment of acquittal, and a new trial is reported at 191 F. Supp. 625. The memorandum of the district court denying a motion to dismiss the indictment (R. 10–11)[1] is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1961 (Pet. 9). The petition for a

[1] The record consists of the appendices to the briefs of appellant and appellee below with loose papers attached thereto. "R." refers to the appendix of the appellant.

writ of certiorari was filed on January 30, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the acceptance by a labor union representative of thirty-four separate sums of money from an employer, on thirty-four different occasions, constituted separate offenses under the Labor Management Relations Act.

2. Whether the trial court erred in admitting, as evidence to rebut a defense, petitioner's statements given voluntarily in a grand jury proceeding on another matter, where some of the statements had been made after he had been admonished by the Assistant United States Attorney that he was improperly refusing to answer questions.

STATUTE INVOLVED

Section 302 of the Labor Management Relations Act of 1947, 61 Stat. 157 (29 U.S.C. 186), provides in pertinent part:

> (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.
>
> (b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the

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As we will discuss below (p. 7) the petition was filed out of time.

employer of such employees any money or other thing of value.

(c) The provisions of this section shall not be applicable (1) with respect to any money or other thing of value payable by an employer to any representative who is an employee or former employee of such employer, as compensation for, or by reason of, his services as an employee of such employer; * * *

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

STATEMENT

Petitioner was charged in thirty-four counts in the District Court for the Middle District of Pennsylvania with having unlawfully received, while a representative of mine employees, thirty-four sums of money on thirty-four different occasions from a mining company, in violation of the Labor Management Relations Act (29 U.S.C. 186(b)(d)).[1] After

[1] The indictment is partially set out on pages 6 through 8 of the record. Count one, after averring that the Knox Coal Company was an employer in an industry affecting interstate commerce and that petitioner was a representative of Knox employees, charged that on August 15, 1957, petitioner "did unlawfully, wilfully and knowingly receive and accept and agree to receive and accept from Knox the sum of $351.70 as follows: One check in the sum of $182.40 and one check in the sum of $172.30."

The remaining thirty-three counts involve dates on the fifteenth and last day of each of the succeeding months through December 31, 1958. The total sums involved, which vary from month to month and total $7,651.88, run from a high of $356.10 to a low of $[illegible]. Otherwise, the averments as to receipt are

the district court denied a motion to dismiss the indictment based on allegations of insufficiency and duplicity (R. 10-12); petitioner was tried and found guilty by a jury on all thirty-four counts (R. 31). He was sentenced to pay a fine of $7,651.88 on count one of the indictment and to serve a term of imprisonment of one year on each of counts two and three, the terms to run consecutively. As to the remaining counts—four through thirty-four inclusive—imposition of sentence was suspended and petitioner placed on probation for a total period of two years, conditioned upon the payment of the fine imposed under count one (R. 107). The court of appeals affirmed.

1. At trial the government's evidence[*] was established predominantly through documentary evidence (including state, company, and union records). These records showed that petitioner, at a time when he was acting as a union committeeman elected to settle employee grievances, received sums of money (paid either by one or two checks) at the end of each of the company's two-week pay periods from August 1, 1957, to December 31, 1958, ostensibly (as shown by time books and payroll sheets) as an employee. The government then produced witnesses who testified that

identical except for a slight difference in the counts beginning with count ten (see the charge of the court, R. 55-56). Counts ten through fourteen charge the receipt of "from Knox, the sum of ———, based on one payment of ——— and another payment of ———", and counts fifteen through thirty-four the receipt of "from Knox the sum of $———".

[*] The evidence is not in dispute and petitioner has not made the trial transcript a part of the record. We are, nevertheless, lodging a transcript with the Clerk of the Court.

petitioner was [illegible] time a motorman (the only occupation listed for him on company records) nor a watchman (as suggested during the trial).

Petitioner called witnesses for the purpose of attempting to show that he was at the time a watchman who received money for services rendered.

In rebuttal, the government offered selected portions of petitioner's testimony before a New York grand jury on January 9, 1958 (at a time when he was receiving company payments).[1] Over defense objections as to relevancy and the court's caution that no reference should be made to the subject of the grand jury investigation, four selected portions of this testimony were read. These excerpts included the statement of petitioner that he had lived in Pittston, Pennsylvania, all his life (R. 15), that he was presently a dress contractor and had no other business, that he had been in the dress business since 1953, and that it had been two years since he had worked in a mine (R. 18). The government also introduced excerpts from the grand jury transcript of petitioner's testimony that he lived at a certain address, that he had worked in the mines for the last time in 1956 as a motorman, and that during the war years he had represented mine employees as a committeeman to settle complaints for an average compensation from the union of fifteen to twenty-five dollars a month (R. 21, 29, 31).

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[1] The subject of the investigation was the meeting held at Apalachin, New York, on November 14, 1957, of persons believed to be important criminal leaders. See *United States* v. *Bufalino*, 285 F. 2d 408 (C. A. 2).

2. The circumstances of the grand jury hearing, occurring more than a year before petitioner was indicted in the present case, are as follows:

At the outset of the proceeding petitioner, appearing as a witness, was informed of his constitutional right not to answer any questions that might tend to incriminate him (R. 14). Thereafter he was asked and he freely answered questions as to his birth, citizenship, family residences, present occupation, prior employment, financial interest, and income. This included the statement that he had ceased working in the mines two years before (R. 15-19). He did not invoke his privilege against self-incrimination until he was asked if he knew Joseph Barbara (R. 19). Subsequently he invoked the privilege thirty-two additional times. He refused to answer questions as to his military service during World War II although he was advised that the statute of limitations had run as to any possible prosecution growing out of conduct at that time, or to testify about his membership in a labor union. He also invoked the privilege when asked if he understood that he could not refuse to answer questions which were not incriminating merely because he did not want to do so, and when asked how the answer to a question could incriminate him (R. 19–49). Petitioner was told by the Assistant United States Attorney at least five times that he was declining to answer questions that obviously could not incriminate and that to waste the time of the grand jury amounted to contempt—a communication that provoked either no response or the repeated invocation of the privilege not to answer (R.

25, 26, 28). A number of times petitioner was directed by the foreman, at the request of the Assistant United States Attorney, to answer questions (R. 23, 24, 25, 28). He complied a few times, supplying information that he had never served in the armed services, and that he had been a member of the United Mine Workers during the period when he was working in the mine (R. 23, 24).

ARGUMENT

1. The judgment of the court of appeals was entered on December 28, 1961. While the petition for a writ of certiorari was received by this Court on January 27, 1962, the record was not received until January 30; therefore the petition was not filed until January 30, thirty-three days after the entry of judgment in the court of appeals. Since Rule 22(2) of the Rules of this Court allows thirty days after the entry of judgment in the court of appeals to file a petition, the petition was out of time.

In any event, as we will now show, petitioner's contentions are without merit.

2. Petitioner's argument that his receipt of thirty-four separate payments from the company whose employees he represented constituted but one offense under the Labor-Management Relations Act is not supported by the language or the purpose of Section 302(b) of the Act.

Section 302(b) establishes as the unit of prosecution every delivery and every receipt of money or other thing of value. Subsection (a) makes it unlawful for the employer to pay or *deliver* any money

to a representative of his employees and, conversely, subsection (b) makes it unlawful for the representative to *receive* or *accept* any money.[4] Petitioner who received thirty-four varying amounts of money on thirty-four different occasions was guilty of the crime prohibited by the statute every time a delivery was made and accepted by him, whether of one or two checks.

This result, which is squarely based on the language of the statute, is further supported by its history and purpose. This Court has indicated that the history and purpose of each statute must be considered in determining the appropriate unit of prosecution.[5] The purpose of this legislation was clearly to prevent interference with the rights of either employees or employers by outlawing any payment or delivery (with stated exceptions) between employer and representative. *United States* v. *Ryan*, 350 U.S. 299, 305-306. See also Section 1 of the Act, 29 U.S.C. 141. In commenting on the language of a similar provision in the so-called Case bill (H.R. 4908, 79th Cong., 2d Sess.), the predecessor of the instant Act, Senator Pepper said (92 Cong. Rec. 4895, 5041):

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[4] The subsections also make it unlawful for the employer to agree to pay or deliver, or the representative to agree to receive or accept, any money.

[5] *Bell* v. *United States*, 349 U.S. 81 (Mann Act); *Harris* v. *United States*, 359 U.S. 19 (narcotics statutes); *Ianelli* v. *United States*, 357 U.S. 386 (narcotics statutes); *Blockburger* v. *United States*, 284 U.S. 299 (narcotics statutes); *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218 (Fair Labor Standards Act).

> "That language forbids every type of delivery * * * and every type of receipt * * *.
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> * * *
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> * * * [T]he amendment * * * attempts to step in and lay down the terms and conditions by which, even under free contractual arrangements and agreements, an employer may not put any money or other thing of value into the hands of the representatives of employers.

As a measure outlawing payments for favor or influence in matters which corrupt parties and injure the public, the legislation is akin to that prohibiting bribery. The court below properly found this case analogous to *Patton v. United States*, 42 F. 2d 68 (C.A. 8), holding that each of several installments paid to a prohibition agent for protection was properly charged and punished as a separate offense. The court below said (Pet. 12): "We think it quite reasonable that Congress should have provided for a separate punishment each time an employee representative places a price upon two weeks of labor peace, just as it did for each transaction in which prohibition agents were paid for two weeks' protection." See also *Biddle v. Wilmot*, 14 F. 2d 505 (C.A. 8).

2. Petitioner has abandoned in this Court his previous contention that his statement before the grand jury that he last worked in the mines in 1956 was coerced and therefore *per se* inadmissible at the trial.*

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* As both courts below noted, this admission was freely and voluntarily given by petitioner at the beginning of his grand jury testimony after he had been fully advised of his rights and before he made any claim of privilege (Pet. 11; 191 F. Supp. 625, 630).

He argues (Pet. 7) rather that "some, if not all" of his statements before the grand jury, and received in evidence at trial, were illegally obtained and that therefore this Court should consider what effect the conduct of the United States Attorney should have upon the admissibility of any statements made during the hearing.

The short answer to petitioner's contention is that, other than his admission that he no longer worked in a mine, the grand jury testimony received at his trial (as to petitioner's address, his duties and last year of work in the mine, and his position as a union committeeman) was harmless and cumulative. Thus, even if it had been illegally obtained, it did not prejudice petitioner. Petitioner's earlier and important admission that he no longer worked in the mine was made before petitioner had made any claim of privilege or the Assistant United States Attorney had made any statements indicating that petitioner was required to answer. This earlier admission could not be affected by later events before the grand jury.

In any event, the large statements made by petitioner before the grand jury were also freely and voluntarily given without objection by petitioner. This record shows no impropriety on the part of the government prosecutor before the grand jury at any time. Petitioner, appearing as a witness, was fully advised of his constitutional right to invoke the privilege against self-incrimination and he assured the grand jury that he understood. The Assistant United States Attorney was not required thereafter to refrain from asking questions which sought answers which

might have been incriminating. *United States* v. *Neff*, 212 F. 2d 297, 312 (C.A. 3). It was up to petitioner to claim the privilege against self-incrimination which he in fact did some thirty-three times including those occasions when he had apparently no basis to believe that an answer would incriminate him. Since such refusals to answer were not valid (see *Rogers* v. *United States*, 340 U.S. 367, 370-373; *Hoffman* v. *United States*, 341 U.S. 479, 488), the Assistant United States Attorney was acting properly in warning petitioner that his actions amounted to contempt and that he was required to answer questions when his answers would not incriminate him. See *Brown* v. *United States*, 359 U.S. 41. In these circumstances there is no basis for petitioner's contention that the testimony introduced at this trial was obtained by trickery.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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